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No. 88-

IN THE

Supreme Court Of The United States

October Term, 1988

HURON VALLEY HOSPITAL, INC. and
MARTIN L. TREPEL, D.O.,

Petitioners

v.

CITY OF PONTIAC, *et al.*

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Sixth Circuit err in affirming that summary judgment was appropriate when the district court had found there was sufficient evidence to establish the existence of a conspiracy in violation of Section 1 of the Sherman Act and of 42 U.S.C. § 1983, but nevertheless found that summary judgment was appropriate because a higher degree of proof was necessary in a health case in order to establish a genuine issue of material fact for the jury?

2. Did the Sixth Circuit err in determining that summary judgment was appropriate under the *Noerr-Pennington* doctrine when the two volunteer health-care groups, through which respondents worked in order to effectuate the conspiracy, were neither contemplated nor mandated by federal or state health care regulations; where the health systems agency which respondents sought to capture was a private, quasi-governmental agency, functioning under federal regulations as the critical point of entry into the health care planning system; and where the bulk of the evidence of conspiracy established capture of both the health systems agency and the state licensing authority?

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the respondents include Bailus Walker, Jr., Maurice S. Reizen, M.D., Herman A. Ziel, M.D., Richard Reihmer, former employees of the Michigan Department of Public Health; City of Pontiac Hospital Building Authority; Sisters of Mercy Health Corp.; the Comprehensive Health Planning Council of Southeastern Michigan; the Greater Detroit Area Health Council, Inc.; the North Oakland County Planning Steering Committee, Terrence E. Carroll, and Paul Masseron.[1]

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[1] The Michigan Department of Public Health was dismissed with prejudice in connection with a settlement agreement with Huron Valley on February 18, 1983. Pontiac Osteopathic Hospital and Crittenton Hospital were dismissed on November 9, 1987. The four former state officials were not initially parties to the Sixth Circuit appeal. Since their case was stayed pending their own appeal to the Sixth Circuit on qualified immunity issues, they did not join in the summary judgment motions filed by the other defendants. Petitioners and the four former state officials stipulated that the former state officials would be subject to this Court's and the circuit court's resolution of the appeal to the same extent as the defendants-respondents.

Pursuant to Supreme Court Rule 28.1, petitioners state that Huron Valley Hospital, Inc. is a Michigan non-profit corporation which is a wholly-owned subsidiary of Health Systems Community Hospitals, Inc., a non-profit corporation organized on a membership basis which, in turn, is a wholly owned subsidiary of Detroit Medical Center, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Huron Valley Hospital, Inc. and Martin L. Trepel, D.O. respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 22, 1988, which granted summary judgment to the respondents.

OPINIONS BELOW

The opinion of the court of appeals (1a-3a) is reported at 849 F.2d 262. The opinion of the district court (4a-42a) is reported at 650 F. Supp. 1325.

JURISDICTION

The judgment of the court of appeals was filed June 22, 1988. (1a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Section 1 of the Sherman Act, 15 U.S.C. §1; Section 1983 of the Civil Rights Act, 42 U.S.C. §1983; and of the National Health Planning Resources & Development Act are reprinted at 43a-44a.

STATEMENT OF THE CASE

The case involves a long-standing conspiracy to prevent petitioner Huron Valley Hospital, Inc. ("Huron Valley") from entering the medical care market in the western Oakland County, Michigan area, and to frustrate at every turn Huron Valley's efforts to build a hospital and provide medical care to patients in the western Oakland County area. The conspirators'[2] ultimate aim

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[2] The respondents include: (a) four former officials of the Michigan Department of Public Health ("MDPH"), Bailus Walker, Jr. ("Walker"), Maurice S. Reizen, M.D. ("Reizen"), Herman A. Ziel, M.D. ("Ziel") and Richard Reihmer ("Reihmer"); (b) four hospitals (collectively referred to herein as the "hospital respondents") --Pontiac General Hospital (represented in this action as City of Pontiac and Pontiac Hospital Building Authority, collectively referred to herein as "Pontiac General" or "PGH"); Pontiac Osteopathic Hospital ("POH"); Crittenton Hospital; and St. Joseph Mercy Hospital; (c) the Comprehensive Health Planning Council of Southeastern Michigan ("CHPC-SEM"), the health systems agency for Southeastern Michigan that was created pursuant to the National Health Planning and Resources Development Act of 1974; (d) Paul Masseron, a member of the CHPC-SEM Executive Committee, the Chairman of CHPC-SEM's Plan Implementation Committee, and a member of Pontiac General's citizen's advisory committee, and Terrence E. Carroll, Executive Director of CHPC-SEM; and (e) the North Oakland County Planning Steering Committee, a voluntary association including each of the hospital respondents. POH and Crittenton were dismissed on November 9, 1987.

was to use their collective power to deprive Huron Valley of funding and to manipulate the state health bureaucracy in a manner to reserve all medical-surgical acute care hospital services in the area to the hospital defendants and their co-conspirators.

1. Historically, the residents of western Oakland County, Michigan, obtained their health care services from hospitals located in the eastern portion of the county. The respondent hospitals were located in Pontiac and, together with POH and Crittenton Hospital, were the primary providers of health care services in the area. In the mid-1970's, the competitive position of respondents, for the first time, was seriously threatened by a group attempting to build a hospital in the western part of the county. On October 5, 1976, this group, Huron Valley, filed an application for a state certificate of need ("CON") under Act 256 of the Public Acts of 1972, Mich. Comp. Laws Ann. § 331.451.[3] With this application, it also filed for federal capital expenditure approval under Section 1122 of the Social Security Amendments of 1972, 42 U.S.C. § 1320a-1 ("capital expenditure approval") with MDPH[4] and the federally designated regional health systems agency, CHPC-SEM. Both applications sought permission to proceed with the construction of a 153-bed acute care hospital. This joint application, after amendment, was accepted as complete for purposes of project review in February 1977. On March 14, 1977, CHPC-SEM recommended to MDPH that Huron Valley's application be denied.

On July 5, 1977, MDPH notified petitioner Huron Valley that MDPH was denying the application and would recommend to the U.S. Department of Health and Human Services ("DHHS") that the contemplated capital expenditure be excluded from reimbursement under Section 1122. Shortly thereafter, Huron Valley

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[3] Repealed and replaced, effective September 30, 1978 by Part 221 of Act 368 of the Public Acts of 1978, Mich. Comp. Laws Ann. 333.22101 *et seq.*

[4] The MDPH was designated by the Governor to act as the State's Designated Planning Agency to administer the federal section 1122 program under the contract between the State of Michigan and the U.S. Department of Health and Human Services.

requested a contested case hearing before the Michigan State Health Facilities Commission ("the Commission") and sought the reversal of the MDPH decision.

On review of the denial of Huron Valley's application, the Commission found numerous irregularities in connection with MDPH's consideration of the application of Huron Valley and of what proved to be a competing application from Pontiac General -- irregularities that unfairly weighted the decisions in favor of Pontiac General. The Commission nonetheless affirmed the MDPH decision on January 24, 1980.

The Oakland County Circuit Court reversed the Commission on March 27, 1981, and ordered MDPH to issue a certificate of need to Huron Valley. *Huron Valley Hospital, Inc. v. Michigan State Health Facilities Commission*, Civil Action No. 80-200439-AA (Oakland County Civ. Ct. March 27, 1981). The decision of the circuit court was affirmed by the Michigan Court of Appeals on October 7, 1981. *Huron Valley Hospital, Inc. v. Michigan State Health Facilities Commission*, 110 Mich. App. 236, 312 N.W.2d 422 (1981). The court of appeals affirmed all the trial court's rulings, finding that: (a) MDPH had based its decision upon unpublished criteria that favored Pontiac General's application, which was "in violation of the statutory procedural limitations in applying their discretion," 312 N.W.2d at 425; (b) Huron Valley was deprived of an impartial review of its application in violation of its rights to due process, 312 N.W.2d at 425-27; and (c) because the MDPH decisions were "unsupported by competent, material, and substantial evidence," the circuit court was correct in directing MDPH to issue a certificate of need to Huron Valley immediately rather than remanding the matter to the Commission for further proceedings, 312 N.W.2d at 427-28.

MDPH issued a certificate of need to Huron Valley in April 1982, but limited its authorized capital expenditure to $14,789,000, the amount originally requested in Huron Valley's 1976 application, more than five years earlier. After the failure of negotiations with the state, Huron Valley filed a petition with the Oakland County Circuit Court in early October 1982, seeking a clarifica-

tion of its prior opinion and an order directing MDPH to issue a certificate of need with a sufficient capital authorization to allow Huron Valley to proceed with construction under the circumstances then existing.

On October 21, 1982, the Oakland County Circuit ordered MDPH to issue a certificate of need in an amount which MDPH found to be reasonable and necessary to allow construction of the 153-bed hospital to proceed. *Huron Valley Hospital, Inc. v. Michigan State Health Facilities Commission*, Civil Action No. 80-200439-AA (Oakland County Civ. Ct. October 21, 1982) (order clarifying opinion and order of March 27, 1981).

Huron Valley's attention then turned to obtaining capital expenditure approval. Following negotiations, a settlement agreement was drafted and submitted to the Regional Administrator for Region V of DHHS in connection with MDPH's recommendation of project approval. On February 24, 1983, the Regional Administrator issued Section 1122 approval on behalf of DHHS. Certain hospital respondents then filed requests for reconsideration of this approval with Dr. Robert Graham, an Assistant Surgeon General in Washington, D.C. On September 13, 1983, Dr. Graham reversed and vacated the original Section 1122 approval.

After an unsuccessful attempt to persuade DHHS to reconsider this decision, Huron Valley included as a count in its federal complaint a mandamus action against DHHS. On April 16, 1984, the district court granted Huron Valley's partial summary judgment motion seeking a *writ of mandamus* directing the Secretary of DHHS to reinstate the Section 1122 approval. *Huron Valley Hospital, Inc. v. City of Pontiac*, 585 F. Supp. 1159 (E.D. Mich. 1984).

2. Huron Valley contends in this case, filed in 1978, that the obstacles it encountered in attempting to obtain a certificate of need were deliberately placed in its way to keep it out of the market for hospital services. Those obstacles and the ability to effectuate them grew out of a long-standing series of interrelationships among respondents. There is no "smoking gun" in this case, but there is a surfeit of evidence which demonstrates respondents

had economic motive and ample opportunity to conspire against Huron Valley. These opportunities arose outside the context of any required cooperative health planning.

a. Respondent Greater Detroit Area Hospital Council, now the Greater Detroit Area Health Council, Inc. ("GDAHC"), was the vehicle through which, in the early 1970's, agreement was reached among the four Oakland County hospitals, Pontiac General, Pontiac Osteopathic, Crittenton and St. Joseph's, and the state and its agents, that any further development of health facilities in Oakland County could occur only through these existing institutions.

GDAHC explicitly claims that the services it provided as a tax-exempt organization were primarily in the area of education. GDAHC's planning policy was that the highest priority should be granted to existing facilities seeking a CON to modernize or correct licensing deficiencies.

b. GDAHC, the self-proclaimed private educational group, caused the formation of respondent North Oakland County Planning Steering Committee ("North Oakland") in 1969. Its only members were the four hospitals. North Oakland, through either the steering committee or administrators' group, met 28 times during the period of January 6, 1975 through March 7, 1977, and 60 times during the period of April 4, 1977 through September 13, 1982. North Oakland endorsed decisions made jointly by the four hospitals and the four hospitals, in turn, ratified decisions made by North Oakland, although there was no federal or state statutory authority for such actions.

In early 1976, there was considerable discussion within the community regarding the fate of Pontiac General. PGH's physical plant had been cited as suffering from various code deficiencies and PGH was operating under the first of several provisional licenses issued by MDPH. These licenses required PGH to undertake a major construction/renovation program in order to cure the deficiencies. The fate of Huron Valley and the renovation and/or replacement of PGH were intertwined. Through involvement in PGH planning, GDAHC and North Oakland were com-

mitted to the replacement and/or renovation of PGH to the exclusion of Huron Valley. In addition, by 1977, each member of North Oakland recognized that the addition of Huron Valley to their trade area would be injurious to their own financial well-being and viability.

c. The role of GDAHC in the CON process and its influence and impact on CHPC-SEM is important in understanding the operation of the combination and conspiracy. From about 1972, GDAHC, the educational association, was under contract to the newly-incorporated CHPC-SEM to conduct substantive reviews of hospital proposals and to submit recommendations to CHPC-SEM's Board of Trustees for consideration and transmittal to MDPH. Pursuant to this contract, GDAHC was responsible for developing criteria and standards with reference to hospital-based health activities and to provide CHPC-SEM with recommendations on capital expenditures and changes in service among the hospitals in southeastern Michigan. The arrangement, which was terminated in 1975 because of the enactment of new federal health planning legislation, required frequent contact between CHPC-SEM, GDAHC and MDPH.

Gottlieb, GDAHC's Executive Director, had frequent contact with Carroll, CHPC-SEM's Executive Director, and the staffs interacted both formally and informally. GDAHC believed and told CHPC-SEM personnel that existing referral patterns in western Oakland County should be "maintained, enhanced and reinforced."

Gottlieb also discussed Huron Valley with the administrators of all the respondents hospitals, plus respondent Paul Masseron, chairman of the CHPC-SEM Committee which had the initial responsibility for reviewing CONs, and respondent Carroll, executive director of CHPC-SEM.

After taking over the project review function from GDAHC, the CHPC-SEM staff, Masseron and Carroll, continued without interruption the GDAHC policy of supporting PGH and opposing any new hospital in western Oakland County.

d. At least by January, 1976, defendant CHPC-SEM was aware that existing hospitals, including Detroit Osteopathic Hospital, PGH, POH and Henry Ford were interested in western Oakland County. At that time, CHPC-SEM personnel held a series of meetings with representatives of the hospitals concerning the plans of these hospitals in western Oakland County.

Discussions concerning the PGH plans with CHPC-SEM staff were simply a continuation of the close working contact PGH had developed with GDAHC. CHPC-SEM staff members were present at a meeting where PGH's three options (renovate, replace at a different location, or retain part of the existing facility and build at another location) were discussed with representatives of GDAHC, CHPC-SEM and PGH.

On July 23, 1976, the CHPC-SEM staff sent to the CHPC-SEM Plan Implementation Committee ("PIC") members a list of matters they anticipated would come before the Committee for review in the next six months. Although this was prior to the time MDPH issued PGH a provisional license and a year prior to the time PGH filed its notice of intent, PGH was listed as a "renovation and modernization and/or replacement project."

e. By 1976, when petitioner Huron Valley filed its CON application, respondents Masseron, Carroll, GDAHC and the hospitals had already excluded any opportunity for Huron Valley to have meaningful access to CHPC-SEM and the CON process. The long-standing policy of GDAHC and North Oakland of restricting Oakland County to existing hospitals and favoring PGH had been adopted by CHPC-SEM and its staff. Carroll simply continued GDHAC policies of resolving important health care issues outside the proper regulatory structure. The result of the staff's analysis of Huron Valley, therefore, was a foregone conclusion.The CHPC-SEM staff analysis, rather than being an analysis, was simply a refutation of Huron Valley's evidence on each and every one of the items on the CON application.[5] In

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[5] On October 15, 1976, CHPC-SEM had requested additional information from Huron Valley, including five-year retrospective financials, and an analysis of the impact of Huron Valley on the facilities presently used in the area, and stated

evaluating Huron Valley's CON application, the CHPC-SEM staff assumed that Pontiac General would continue to operate in the future in Oakland County at about the same level of beds at which it had been operating, that is, CHPC-SEM assumed PGH's application for a CON would be approved without any reduction in beds.

Although the staff of CHPC-SEM advised Huron Valley that it should not attach support letters to its CON application, CHPC-SEM apparently did not advise Huron Valley that comments, including negative comments, which the staff solicited from "affected parties" would be included in the staff analysis and transmitted to the CHPC-SEM committees. No CHPC-SEM recommendations, other than that for Huron Valley, contained letters from other hospitals in the area.

The actual hearings by the CHPC-SEM volunteer committee were pro forma. The CHPC-SEM PIC adopted the report of the staff on February 23, 1977 and recommended to the Executive Committee that the Huron Valley application be denied. At that meeting, the members were told that the staff was making the assumption that PGH would remain the hospital servicing the needs of the city of Pontiac. Although Masseron, the PGH spokesman and chairman of the Committee, did not vote on the application, the committee members were aware of his support for PGH.

On March 10, 1977, the CHPC-SEM Executive Committee met and voted to recommend to MDPH that Huron Valley's application be denied. The Executive Committee adopted the staff

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that discussions should have been held with all existing providers of health care to the proposed service area. A GDAHC employee predicted this would happen when he told Verna Sillers of POH at a North Oakland meeting that CHPC-SEM would continue to kick back Huron Valley's application. Huron Valley filed an amended application on January, 1977 which was also kicked back by CHPC-SEM because it required additional information. A subsequent application was then filed by Huron Valley. It was not until February 10, 1977 that the application was accepted as complete for purposes of project review. It was clear that every attempt by HVH to meet CHPC-SEM criteria or to address health planning issues would be opposed.

analysis and recommendation without a change of so much as a single word.

f. In contrast to the tortured attempt by Huron Valley to get its CON approved by CHPC-SEM, PGH had no problems whatsoever. On June 27, 1977, PGH filed a notice of intent for a CON for a renovation and building program of $36 million. On December 8, 1977, PGH filed its CON and § 1122 application. Less than three weeks later, on December 21, 1977, the PIC recommended approval of the PGH CON. On January 12, 1978, about three weeks later, the CHPC-SEM Executive Committee recommended approval of PGH's CON and § 1122 application, and it was forwarded to MDPH. There the entire matter was concluded on August 21, 1978, when MDPH approved PGH's CON application.

g. The decision not to allow any new hospitals into Oakland County had long since been made at the state level because of the state's participation in the combination and conspiracy. Frequent conversations between MDPH and GDAHC and MDPH and CHPC-SEM provided ample opportunity for the regional entities to enlist the state in their conspiracy. These contacts shut off from the beginning any possibility that the Huron Valley CON would be considered seriously. They are important in view of MDPH's unpromulgated criteria favoring the existing hospitals, which the state courts found had formed the basis for MDPH's decision to deny Huron Valley's CON application. These unpromulgated state criteria were almost identical to the policies of GDAHC and North Oakland, later adopted by CHPC-SEM, protecting the existing hospitals from new entrants. When these state criteria did appear in a state plan, they appeared *only* in the planning criteria for the southeastern Michigan area, reinforcing the conclusion that MDPH adopted the GDAHC approach.

Huron Valley's application was the first ever received by MDPH for the construction of a new "from the ground up" hospital and constituted the first such application ever filed pursuant to Act 256. Nevertheless, the planning analyst assigned to review Huron Valley's application had no formal training nor prior work

experience in health care planning. The analyst relied heavily upon the CHPC-SEM staff analysis which had a substantial influence on the report. It is not unfair to characterize the state report as a "cut and paste" job of the CHPC-SEM Staff Report.

The analyst's report and the MDPH file were forwarded to the respondent Director, who made a cursory review of the materials and endorsed the conclusion to deny Huron Valley a CON. The nature of this process supports the inference that the MDPH respondents had predetermined that MDPH would do nothing other than rubberstamp the CHPC-SEM recommendation to deny the Huron Valley CON. Huron Valley once again had been denied meaningful access to a necessary regulatory body. Denying the newcomer Huron Valley an opportunity to compete as a hospital in Oakland County, thus, had been foreordained both by CHPC-SEM and MDPH before Huron Valley had filed its application.

h. What occurred after the Regional Administrator issued § 1122 approval on behalf of DHHS shows the vitality of the combination and conspiracy as late as 1983, over six years after Huron Valley had first filed its application for a CON. Respondent Carroll orchestrated a scenario in which three hospitals, PGH, POH and St. Joseph's, joined CHPC-SEM in a successful effort to overturn the § 1122 approval by HHS. On September 13, 1983, in an extremely unusual action, Dr. Graham of HHS reversed and vacated the original § 1122 approval. Not until the district court issued a writ of mandamus on April 16, 1984, did Huron Valley finally receive its § 1122 approval.

3. In May 1986, after the close of discovery in this case, certain of the respondents moved for summary judgment. The district court granted those motions and petitioners appealed to the Sixth Circuit. The Sixth Circuit, *per curiam*, affirmed the district court's opinion and adopted its logic. (1a.)

4. The district court held that there was no genuine issue of material fact as to the existence of the alleged conspiracy, either under Section 1 of the Sherman Act or 42 U.S.C. §1983. The court came to this conclusion despite its opinion that petitioners had

shown that respondents were not acting independently and that "[i]n other contexts, the amount of cooperation and joint activity among respondents in this record might justify sending the case to the jury." (27a)

5. The district court similarly held that, despite the extensive evidence upon which a jury might decide that a regulatory agency had been captured (particularly if the evidence of a long-standing conspiracy was given credence), the actions of respondents came under the protection of the *Noerr-Pennington* doctrine. (34a)

6. In large part, the district court's analysis of the substantive legal issues was shaped by the court's failure to perceive that the activities of respondents were undertaken independently of, and not driven by, the regulatory scheme in question.

7. The district court also put a greater burden on petitioners in responding to a motion for summary judgment than has been applied by other courts in areas which do not involve health care.

REASONS FOR GRANTING THE PETITION

Petitioners seek review of two questions of law on which the district court, and the court of appeals, departed in serious ways from the prior decisions of this court. This case presents important and recurring questions about immunity from the antitrust laws in regulated industries and immunity from the antitrust laws in the health care industry which is now partially regulated and partially unregulated.

Further, this case raises important issues about the burdens on the parties to summary judgment motions, an issue which this Court has moved to clarify in recent cases. The district court has muddled the issue by essentially holding that a different standard may be applied to cases involving the health care industry.

The case also presents novel questions surrounding the *Noerr- Pennington* doctrine. The district court decision essentially makes it impossible for a plaintiff to go to a jury on a conspiracy case based upon circumstantial evidence and involving any form

of petitioning a government entity. Given the amount of evidence that petitioners had produced of a conspiracy among respondents, substantial evidence of agency capture existed. The district court's holding that the *Noerr-Pennington* doctrine protects respondents conflicts with prior cases that have reserved agency capture as an exception to the *Noerr-Pennington* doctrine.

This Court should grant review to correct the manifestly erroneous decision of the court of appeals adopting the district court's opinion.

1. Summary Judgment In Health Care Cases.

In several recent cases, this Court has explored the proper standard for grant of summary judgment motions, both within and without the antitrust field. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court concluded that the Third Circuit had erred by not sufficiently considering the absence of a plausible motive for the defendant companies to enter into a predatory pricing conspiracy. Given that absence of plausible motive, the direct evidence of other conspiracies offered by plaintiffs was insufficient to allow an inference of the existence of the predatory pricing conspiracy. 475 U.S. at 596-97.

Under *Matsushita*, if, as is usual in cases involving conspiracy allegations, there is no direct evidence of the alleged conspiracy, a court must consider a number of factors in evaluating whether the existence of the conspiracy can be inferred. These factors include the economic rationality of the alleged conspiracy, the motive of the conspirators to participate in the conspiracy, and the nature of the other conduct asserted as the basis for inferring the existence of the alleged section 1 conspiracy.

In this case, the district court found that petitioners had met these standards for inferring the existence of a conspiracy. The court found that, "[i]n other contexts, the amount of cooperation and joint activity among respondents in this record might justify sending the case to the jury." 650 F.Supp. at 1338-39; 27a. The court granted summary judgment for respondents, however, on the basis that the conspiratorial activity "was cooperation equally

suggestive of compliance with legislation encouraging joint planning in the health field as with antitrust conspiracy." *Id.* In so holding, the district court expanded the reach of the health care laws and placed a summary judgment burden on petitioners that is impossible to surmount.

Petitioners contend that when the only legitimate alternative explanation for anticompetitive activity is federal and state legislation, the argument amounts to an implied repeal argument. This Court has established the principle that immunities from the antitrust laws are to be construed narrowly and limited to the scope clearly intended by Congress. *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 125 (1982); *National Gerimedical Hospital & Gerontology Center, Inc. v. Blue Cross*, 452 U.S. 378, 388-89 (1981); *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 11-12 (1976).

There is nothing within the statute itself or its legislative history which supports the argument that the National Health Planning Resource Development Act ("NHPRDA"), 42 U.S.C. §300k *et seq.* (repealed in part 1986) authorizes or encourages private meetings among health care providers to share information or develop plans. The district court itself acknowledged that "[t]he legislation regulating the health care industry does not explicitly require the existence of GDAHC and [North Oakland]." 650 F. Supp. at 1337; 26a. The NHPRDA acknowledged the need for provider cooperation in the health planning process it was establishing, 42 U.S.C. §300k(a)(5), but also carefully controlled provider participation at the local level of planning. Thus, because of the fear that providers might dominate local health planning, Congress provided that the majority of the members of the health systems agency ("HSAs") be consumers, not providers, of health care. 42 U.S.C. § 300*l*-1(b)(3)(C)(i); *see, e.g.*, Report of the Secretary of Health, Education & Welfare, *reprinted in* 4 U.S. Code, Cong. & Admin. News, 93d Cong., 2d Sess. (1974) at 7919.

The 1979 Amendments also encouraged HSAs to use the assistance of private organizations and individuals where practicable while, at the same time, reemphasizing that one purpose of the

NHPRDA was to reduce "provider-domination of planning agency decisions." S. Rep. No. 96, Health Planning and Resources Development Amendments of 1979, *reprinted in*, 2 U.S. Code, Cong. & Admin. News, 96th Cong., 1st Sess. (1979) at 1306, 1310, 1319, 1357, 1366.4.

This Congressional concern over the role of health care providers and other private entities in health care planning is also reflected in how the HSAs were expected to do business. Congress intended an HSA to "(a) conduct [its] business meetings in public, (b) give adequate notice to the public of such meetings, and (c) make its records and data available upon request, to the public." Report of the Secretary of Health, Education & Welfare, *reprinted in* 4 U.S. Code, Cong. & Admin. News, 93d Cong., 2d Sess. (1974) at 7929, 7935; *see also* S. Rep. No. 96, *reprinted in* 2 U.S. Code, Cong. & Admin. News, 96th Cong., 2d Sess. (1979) at 1306, 1382.

While Congress wanted provider participation in the planning process, private meetings among providers to reach their own accommodations on issues facing the entire community clearly fly in the face of the planning structure Congress established.

Without statutory authorization, what occurred here is no different from competitors' group meetings in any other industry -- economic actors making decisions based on their own economic self-interest and not those more diverse public interests which both the antitrust and health planning laws were designed to promote. Such private group meetings of provider competitors can be condemned without any adverse effect on the health planning structure envisioned by Congress and continued by many of the states in one form or another.

In *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U.S. 378 (1981), this Court rejected the contention that the NHPRDA immunizes all private conduct undertaken in response to the health planning process. 452 U.S. at 391-93. The one example that the Court cited in a footnote where antitrust immunity might be necessary to make the NHPRDA work was where "an HSA has expressly advocated a form of cost-saving

cooperation among providers." 452 U.S. at 393 n. 18. This language implies that even where an HSA has expressly advocated some type of cooperation, if it is not necessary to make the NHPRDA work, antitrust immunity is not appropriate. In this case, by contrast, the HSA had no idea what deals were cut among the hospitals in their private meetings. This type of private decision-making among providers is in direct contradiction to the NHPRDA's goal to rationalize the planning process and open it up to all those affected.[6]

The district court's conclusion that summary judgment was also appropriate on the conspiracy allegations in the civil rights claim was based, once again, upon a misinterpretation of the federal and state health planning laws. The district court stated:

> interaction [among private respondents and state officials] is anticipated in state and federal health planning legislation .... Such cooperation and interaction does not provide the state action necessary to support a lawsuit under Section 1983 .... [T]his case addresses a business context and legislation which requires interaction between the private and the public parties must be considered in determining whether state action could be found here.

650 F. Supp. at 1345; 41a.

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[6] In *State of North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc.*, 740 F.2d 274 (4th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985), the only case after *National Gerimedical* other than the Sixth Circuit's 1981 *Huron Valley* opinion to raise this aspect of implied repeal of the antitrust laws, the Fourth Circuit found that the NHPRDA did not effect an implied repeal of the antitrust laws. After opining that the 1974 NHPRDA was silent as to "what Congress intended the relationship between regulation and competition to be," 740 F.2d at 281, and that the 1979 Amendments were added "in order to provide for competition merely to be *supplemented* by regulation," *id.* (emphasis in original), the court concluded that the situation at hand was not that contemplated by this Court in footnote 18. The Fourth Circuit's understanding of this Court's example was "that voluntary cooperation *between* health care providers and health systems agencies might not be considered illegal collusion." 740 F.2d at 281 (emphasis added).

The district court specifically references Act 256, the then-operative Michigan CON law, the NHPRDA and Section 1122 as requiring CHPC-SEM to submit and MDPH to consider a CHPC-SEM recommendation on the CON application. *Id.* That recommendation, according to respondents, emanated from the "volunteer committee structure" of CHPC-SEM. Once the recommendation was transmitted, CHPC-SEM had no further statutory role.

Petitioners submit that a great deal more than that happened in this case. Although the district court dismisses the point in an aside, 650 F. Supp. at 1345 n.8; 41a n.8, the Michigan state courts have found that, in evaluating Huron Valley's CON application, MDPH was using criteria favoring existing hospitals which had no statutory basis and which had not been promulgated as rules. *Huron Valley Hospital, Inc. v. Michigan Health Facilities Commission*, 110 Mich. App. 236, 312 N.W.2d 422 (1981). The Sixth Circuit found that the individual state respondents knew or should have known that the use of such criteria was wrong. *Huron Valley Hospital, Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir.), *cert. denied*, 107 S. Ct. 278 (1986). The extensive contacts among the state actors and the private actors were to insure that a policy with no basis in state law was effectively used to keep Huron Valley from receiving a CON. It is difficult to envision how such a series of contacts effectuates the purposes of either the federal or state health planning laws.

Petitioners did not "merely" show that MDPH officials communicated with CHPC-SEM representatives and the hospital respondents. 650 F. Supp. at 1345-46; 41a. Petitioners detailed an extensive series of contacts among these individuals concerning Huron Valley and the policy favoring existing hospitals. That evidence is sufficient to rebut respondents' affidavits and create a genuine issue of material fact.[7]

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[7] MDPH's assignment of a new and totally inexperienced analyst to the Huron Valley CON application, the first such application for a start-up hospital under the new law, is indeed relevant to the conspiracy issue. *Cf.* 650 F. Supp. at 1346; 41a. It is a reasonable inference that MDPH would have handled the analysis of the application in a different way had MDPH not been committed to the conspiracy.

The district court's conclusion also represents a distortion of *Adickes v. S. H. Kress Co.*, 398 U.S. 144 (1970). *Adickes* holds that there need not be an explicit agreement among conspirators to attain a specific goal, only that the conspirators "somehow reached an understanding" concerning that goal. 398 U.S. at 152. Adickes did not have to show that a conspiracy was directed against her personally, only against whites in the company of blacks. *Id.* So, too, Huron Valley need show only that, as a member of the class of "newcomer" hospitals, it was a focus of the conspiracy to protect existing hospitals.

Although the HSA structure created by the NHPRDA has been repealed by Congress, Pub. L. 99-660, 100 Stat. 3799 (1986), the lower court opinions, unless reversed, will have continuing impact in the quasi-regulated world of health care and in other regulated industries. The district and circuit courts have provided a lesser standard for recognizing statutory implied repeals of the antitrust laws and have raised a greater burden for non-movants on summary judgment than that contemplated by any of this Court's interpretations of Fed. R. Civ. P. 56. This Court, therefore, should grant review and reverse the Sixth Circuit's endorsement of a broader immunity from the antitrust laws neither contemplated by Congress nor recognized by the courts.

2. The *Noerr-Pennington* Doctrine.

This case poses an issue beyond that recently addressed by this Court in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 56 U.S.L.W. 4539 (U.S., June 14, 1988). In that case, this Court held that where an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), does not immunize that party from antitrust liability flowing from the effect that the standard has of its own force in the marketplace. 56 U.S.L.W. at 4543. This Court concluded that *Noerr* immunity depends not only upon the impact of anticompetitive activity but also upon the context and nature of the activity. 56 U.S.L.W. at 4542. Courts must, therefore, look beyond

whether or not concerted efforts are genuinely intended to influence governmental action. 56 U.S.L.W. at 4541.

The *Allied* Court reiterated that "in whatever form, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action." 56 U.S.L.W. at 4540 n.4, *citing*, *Noerr*, 365 U.S. at 144; *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972). The scope of the immunity under *Noerr* and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) thus, depends upon the "source, context, and nature of the anticompetitive restraint at issue." 56 U.S.L.W. at 4540.

Petitioners contend that three types of respondents' activities constituted "sham" activity which should not be protected from antitrust liability. First, participation of government officials in the conspiracy to delay or prevent Huron Valley from entering the market constitutes "sham" activity. Second, the requests for reconsideration of Huron Valley's §1122 approval made by CHPC-SEM, Pontiac General, Pontiac Osteopathic and St. Joseph's were efforts to hurt Huron Valley directly by causing additional delay. Third, the prior commitment of MDPH and CHPC-SEM in combination with the hospitals to protect existing hospitals effectively barred Huron Valley from any meaningful access to the regulatory process.

If petitioners' evidence of a conspiracy to eliminate Huron Valley from the health care market is sufficient to raise genuine issues of material fact, as petitioner argued *supra*, then it is more than sufficient to survive a motion for summary judgment on *Noerr-Pennington* grounds. That is because the alleged conspiracy involved extensive capture of the entry point into the regulatory system -- CHPC-SEM -- and of the public agency making the decisions -- MDPH. The anti-competitive activity, thus, involves more than just valid efforts to influence government action.

In *California Motor Transport*, this Court reiterated that a party may petition all branches of the government, even for anti-competitive purposes. However, where that conduct involves a "combination of entrepreneurs to harass and deter their com-

petitors from having 'free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group," the conduct will fall within the sham exception to the *Noerr-Pennington* doctrine. 404 U.S. at 515. This is true where the conspirators effectively become the "regulators of the grants of rights, transfers and registrations" to the plaintiff. 404 U.S. at 511. This general concept has been reiterated by the Sixth Circuit in its opinion in *Westmac, Inc. v. Smith*, 797 F.2d 313, 316-17, n.5 (6th Cir. 1987) where the court stated that conspiracy can satisfy the sham exception as well as activities that are "an integral part of a larger antitrust conspiracy."

Several cases have found this sort of pattern of activity within the sham exception. *Litton Systems, Inc. v. American Telephone and Telegraph Co.*, 700 F.2d 785 (2nd Cir.), *cert. denied*, 464 U.S. 811 (1983); *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir.), *cert. denied*, 459 U.S. 1170 (1982); *Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F. Supp. 543 (M.D.N.C. 1979).

Petitioners contend that genuine issues of material fact were raised as to whether MDPH officials, CHPC-SEM officials and the hospital respondents participated in a conspiracy, not necessary to the functioning of the health care planning structure, to protect existing hospitals and keep Huron Valley out of the market. This preference for existing hospitals, encouraged and endorsed by the respondent hospitals, was the operative policy at the two key entities from which Huron Valley sought CON approval: CHPC-SEM and MDPH. With that unpromulgated policy in place -- a policy with absolutely no basis in state or federal law -- the conspirators "became the regulators of the grants of rights, transfers and registrations" to Huron Valley. While the actual method of agency capture differs in its details from that in such cases as *California Motor Transport*, it is just as effective and should not be exempt from Sherman Act prosecution.

The district court also concluded that the various defendants' requests to the Secretary of Health and Human Services to reconsider approval of Huron Valley's section 1122 application did not constitute sham activity undertaken solely to delay the hospital

project. 650 F. Supp. at 1342; 34a. In the Huron Valley situation, in contrast to that in *Potters Medical Center v. City Hospital Assoc.*, 800 F.2d 568 (6th Cir. 1986), upon which the district court relied, the state had already issued its approval of the section 1122 application, as had the regional administrator of the federal agency. Unsolicited letters opposing approval for Huron Valley, sent one day apart, came from two hospitals to HHS in December 1982. After federal approval was granted, requests for reconsideration came from defendant CHPC-SEM and three defendant hospitals and from no other health care provider in the area. During the pendency of the reconsideration requests, Huron Valley was seeking financing for the hospital and was under severe time pressures because of the time limits on the CON. On September 13, 1983, in an extremely unusual action, HHS reversed and vacated the original §1122 approval. The HHS decision was ultimately reversed by the district court's issuance of a *writ of mandamus* to the Secretary of HHS. 585 F. Supp. 1159 (E.D. Mich. 1984) ("There was simply no statutory authorization for Dr. Graham's action in this case.") That prior finding by the district court should have been sufficient to rebut the Sixth Circuit's *Westmac* presumption that "when a lawsuit raises a legal issue of genuine substance, ... it is a serious attempt to obtain a judgment on the merits instead of a mere sham or harassment." 797 F.2d at 318. Respondents' requests for reconsideration, contrary to the district court's finding, 650 F. Supp. at 1342, simply did not raise any legal issues of genuine substance. Thus, to paraphrase *Potters*, the conclusion that the respondents did engage in a sham by participating in this process is reinforced by the very fact that their position did not prevail. 870 F.2d at 578; *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1257 (9th Cir. 1982) (*en banc*), *cert. denied*, 459 U.S. 1227 (1983); *Federal Prescription Service, Inc. v. American Pharmaceutical Association*, 663 F.2d 253, 265 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); *Neumann v. Reinforced Earth Co.*, 594 F. Supp. 139 (D.D.C. 1984) *aff'd*, 786 F.2d 424 (D.C. Cir.), *cert. denied*, 107 S. Ct. 181 (1986). Respondents were aware Huron Valley had obtained its CON; were aware of the time deadlines through their own experience with CONs; and were similarly aware of the significance of §1122 approval.

In this case, therefore, unlike *Allied*, there is joint private and public action. Petitioners' primary allegation is one of agency capture, a situation beyond that addressed in *Allied*. This Court should take the opportunity to clarify the analytical relationship between allegations of comprehensive conspiratorial activity involving government and private entities and protestations of proper government lobbying.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: September 16, 1988

Nos. 87-1246, 87-1303

United States Court Of Appeals

FOR THE SIXTH CIRCUIT

HURON VALLEY HOSPITAL, INC.,

et al.,

Plaintiffs-Appellants,
Cross-Appellees,

v.

CITY OF PONTIAC, et al.,

Defendants-Appellees,
Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

Decided and Filed June 22, 1988

Before: **KEITH**, and **WELLFORD**, Circuit Judges; and **EDWARDS**, Senior Circuit Judge.

PER CURIAM. This case comes to us by way of summary judgment motions which were granted with respect to ten defendants by District Judge Horace Gilmore. Plaintiffs-appellants alleged a conspiracy to violate antitrust laws which was filed in the first instance in 1978 by Huron Valley Hospital. On appeal from the first judgment of the District Court entered in 1979, this court vacated the District Court's decision. See *Huron Valley Hospital,*

Inc. v. City of Pontiac, et al., 666 F.2d 1029 (6th Cir. 1981). Thereafter, plaintiffs filed an amended complaint claiming that a conspiracy existed to prevent plaintiff Huron Valley Hospital from entering the medical care market in western Oakland County, and to frustrate Huron Valley's efforts to build a hospital and provide medical care to patients in that area. The amended complaint also charged that the defendants' ultimate aim was to use their collective power to deprive Huron Valley of funding and to manipulate the state health bureaucracy in a manner which would reserve all medical-surgical acute care hospital services in the area to the hospitals already in existence in the area.

In May 1986, after lengthy discovery, certain of the defendants filed for summary judgment which the District Court granted. See *Huron Valley Hospital, Inc. v. City of Pontiac, et al.*, 650 F. Supp. 1235 (E.D. Mich. 1986). What we have before us now is plaintiffs' appeal from that grant of summary judgment.

Our review of this record and of Judge Gilmore's careful 45-page opinion convinces this Court that all possible facts have been entered into this record and that summary judgment with respect to all ten of the named defendants was properly granted. We therefore affirm Judge Gilmore's grant of summary judgment with respect to: City of Pontiac, City of Pontiac Hospital Building Authority, Pontiac Osteopathic Hospital, Crittenton Hospital, Sisters of Mercy Health Corporation, Comprehensive Health Planning Council of Southeastern Michigan (CHPC-SEM), North Oakland County Planning Steering Committee (NOCPSC), Greater Detroit Area Health Council, Inc. (GDAHC), Paul Masseron, and Terence E. Carroll.

The four remaining individual defendants, Richard A. Reihmer, Maurice S. Reizen, M.D., Bailus Walker, Jr., and Herman A. Ziel, Jr., M.D., have signed a stipulation agreement with plaintiffs which provides that, with respect to the allegations of conspiracy against them, both sides are bound as if Judge Gilmore's December 18, 1986 Opinion had applied to them. They have also agreed to be bound by any ruling by this Court with respect to those conspiracy allegations. Therefore, our affirmance today of the Dis-

trict Court's grant of summary judgment also applies to the conspiracy claims against the four individuals named above.[1]

[1] This leaves pending before the District Court only the claims that allege non-conspiratorial violations of the plaintiffs' civil rights in violation of 42 U.S.C. § 1983.

HURON VALLEY HOSPITAL, INC.
and Martin L. Trepel, D.O.,

Plaintiffs,

v.

CITY OF PONTIAC, a Michigan municipal corporation; City of Pontiac Hospital Building Authority, a Michigan municipal corporation; Pontiac Osteopathic Hospital, a Michigan nonprofit corporation; Sisters of Mercy Corporation, a Michigan nonprofit corporation; Comprehensive Health Planning Council of Southeastern Michigan, a health systems agency; North Oakland County Planning Steering Committee, a planning group under the auspices of Greater Detroit Area Health Council, Inc., a Michigan corporation; United States Department of Health and Human Services, an executive agency of the United States; Margaret Heckler, as Secretary of the Department of Health and Human Services; Bailus Walker, Jr.; Maurice S. Reizen, M.D.; Herman A. Ziel, M.D.; Richard Reihmer; Paul Massaron, and Terence E. Carroll,

Defendants.

No. 78-2970.

UNITED STATES DISTRICT COURT,
E.D. Michigan, S.D.

Dec. 18, 1986.

GILMORE, District Judge.

This matter is again before the Court upon defendants' motions for summary judgment.[1] The defendants jointly moving the Court for summary judgment roughly fall into three categories. The first group is the hospital defendants, namely, Pontiac

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[1] See this Court's prior opinions, *Huron Valley Hospital, Inc. v. City of Pontiac*, 585 F. Supp. 1159 (E.D. Mich. 1984) and *Huron Valley Hospital, Inc. v. City of Pontiac*, 612 F. Supp. 654 (E.D. Mich. 1985), *affirmed* 792 F.2d 563 (6th Cir.), *cert. denied* ____ U.S. ____, 107 S.Ct. 278, 93 L.Ed.2d 254 (1986).

General Hospital (PGH), Pontiac Osteopathic Hospital (POH), Crittenton Hospital, and St. Joseph Mercy Hospital (SJMH). The second group is the organizational defendants, namely, Comprehensive Health Planning Council of Southeastern Michigan (CHPC-SEM), Greater Detroit Area Health Council, Inc. (GDAHC), and North Oakland County Planning Steering Committee (NOCPSC). The third group is the individual defendants, Paul Massaron and Terence Carroll.[2] Massaron is a former chairman of a CHPC-SEM committee. Carroll has been executive director of CHPC-SEM since 1971.

I. BACKGROUND

In its first amended complaint, plaintiff Huron Valley Hospital alleges it sustained injury redressable in federal court under three theories. Count I alleges all of the defendants conspired to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiff claims this conspiracy seriously hampered its efforts to enter and compete in the market for acute care hospital services in Oakland County.

Count II alleges violations of plaintiff's civil rights, specifically that plaintiff was deprived of property without due process of law in violation of 42 U.S.C. § 1983. Plaintiff relies on the same factual allegations in Count II as in Count I. Count II charges only the four hospital defendants, Massaron, Carroll, and the four state defendants.

In 1984, this Court disposed of Count III, a request for writ of mandamus, by directing the Secretary of Health and Human Services to reinstate plaintiff's Section 1122 approval. *Huron Valley Hospital, Inc. v. City of Pontiac*, 585 F. Supp. 1159 (E.D. Mich. 1984). There was no appeal.

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[2] Plaintiffs also name as defendants four officials of the Michigan Department of Public Health (MDPH). The state defendants are not before the Court on these motions for summary judgment.

In addition to a summary judgment motion in which all defendants join, four individual motions were submitted by GDAHC and NOCPSC jointly, Massaron, Carroll, and CHPC-SEM. The Court finds it can decide the motions based on arguments made in the joint motion of all defendants, and therefore will address only those arguments.[3]

There are three dispositive issues. The first is whether plaintiff's evidence of conspiracy is sufficient to withstand a motion for summary judgment on Count I alleging violation of Section 1 of the Sherman Act. The second is whether summary judgment is appropriate because defendant's conduct is protected concerted activity under the *Noerr-Pennington* doctrine. The third is whether plaintiff's evidence of conspiracy is sufficient to withstand a motion for summary judgment on the element of state action necessary to support Count II alleging violation of 42 U.S.C. §1983.

II. FACTS

With discovery now closed, the record in this case is voluminous, consisting of more than 50 depositions, more than 300 exhibits, and several affidavits. The question now presented is whether a reasonable jury, confronted with this mass of evidence, could find in favor of plaintiff. The dispute focuses on the permissible inferences from the facts set forth below.

As explained in this Court's prior opinion, 585 F. Supp. 1159 (1984), in order for plaintiff to build its hospital, it had to obtain a certificate of need (CON) from the State of Michigan, and capital expenditure approval from the Department of Health and Human Services (HHS) under Section 1122 of the Social Security Act, 42 U.S.C. § 1320a-1. The Section 1122 program, along with the National Health Planning and Resources Development Act of 1974, 42 U.S.C. §300k *et seq*., are major federal programs established to cut down unnecessary medical costs. Under this legisla-

[3] In addition, defendants have submitted several motions in limine to exclude evidence, but the Court finds it is unnecessary to exclude the subject evidence to reach its decision.

tion, states, including Michigan, have established CON programs to insure that new hospital construction or expansion of existing facilities are not undertaken in areas where they are not needed. The Michigan Department of Public Health (MDPH) is the state agency that administers both the CON program and the Section 1122 program, pursuant to contract with HHS. Under both the federal and state schemes, MDPH is to obtain the nonbinding recommendation of the local health services agency on an application for CON and Section 1122 approval. In the case at bar, CHPC-SEM was the local health services agency.

The following is the timetable for plaintiff's procurement of Certificate of Need (CON) and Section 1122 approval.

October 1976:	Joint CON and Section 1122 application filed with CHPC-SEM and MDPH
January 1977:	First amended application submitted pursuant to CHPC-SEM request for 5-year financial retrospectives
February 1977:	Second amended application submitted pursuant to CHPC-SEM request for additional materials
February 10, 1977:	CHPC-SEM considers plaintiff's application complete
February 14-17, 1977:	CHPC-SEM staff completes "staff analysis" of plaintiff's application and submits it to plaintiff and the CHPC-SEM Plan Implementation Committee (PIC). This analysis contains no recommendation. However, it addresses seven categories of CHPC-SEM Board adopted criteria and concludes with respect to five categories that "this project is not consistent with CHPC-SEM Board-adopted criteria."
February 23, 1977:	CHPC-SEM PIC, chaired by Masssaron, with 20 of 27 members present, reviews

	plaintiff's application. PIC votes 14-1, Massaron abstaining, to recommend disapproval.
March 10, 1977:	Massaron presents PIC recommendation to CHPC-SEM Executive Committee. Executive Committee, with 17 of 24 members present, votes 9-1 (with Massaron abstaining) to recommend disapproval to MDPH. This recommendation is legally nonbinding on MDPH.
March 14 - July 5, 1977:	Contacts between plaintiff and MDPH, and between MDPH AND others. MDPH solicits additional information from Plaintiff. MDPH denies plaintiff's application.

Although MDPH denied plaintiff's application, plaintiff ultimately obtained a CON and Section 1122 approval in April 1984.[4]

Harper Grace Hospitals acquired plaintiff in October 1984, after which plaintiff had sufficient financial backing to begin construction of its hospital. In March 1986, Huron Valley Hospital opened for business.

In contrast to plaintiff's timetable, Pontiac General Hospital (PGH) filed its CON and Section 1122 application on December 8, 1977, and received approval from MDPH on August 25, 1978.

The fate of PGH was up in the air at the time plaintiff entered the health care picture. In 1975, MDPH deemed PGH's facilities deficient, and required it to correct its shortcomings within three years or lose its license to operate. To do this, PGH had to apply for a CON. Ultimately, it was decided PGH would rebuild in Pontiac.

Coincidentally, Massaron, the CHPC-SEM PIC chairman, was also actively involved in the PGH controversy. On behalf of

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[4] See this Court's opinion at 585 F. Supp. 1159 (1984) and *Huron Valley Hospital, Inc. v. State Health Facilities Commission*, 110 Mich. App. 236, 312 N.W.2d 422 (1981).

the UAW, Massaron publicly supported continued city ownership of PGH and rebuilding in the city.

The basic thrust of plaintiff's argument is that the defendants entered into a conspiracy to favor the continued existence of an established hospital, like PGH, at the expense of those, like plaintiff, who wanted to enter the health care market. The Michigan Court of Appeals held, in reviewing plaintiff's application for a CON, that reliance on criteria favoring existing facilities was unjustified because the MDPH had promulgated no rule to that effect under the Michigan Administrative Procedures Act. *Huron Valley Hospital v. State Health Facilities Commission*, 110 Mich. App. 236, 312 N.W.2d 422 (1981). Further, this Court in *Huron Valley Hospital v. City of Pontiac*, 612 F. Supp. 654, 660-61 (E.D. Mich. 1985), found that alleged abuses of discretion and violations of statutory authority present in the administration of the CON statute could constitute violations of clearly established law, and, therefore, the state defendants were not entitled to immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). This opinion was affirmed by the Sixth Circuit in *Huron Valley Hospital v. City of Pontiac*, 792 F.2d 563 (6th Cir.), *cert. denied* U.S. , 107 S. Ct. 278, 93 L.Ed.2d 254 (1986).

A brief discussion of the functions of two of the defendants, Greater Detroit Area Health Council, Inc. (GDAHC), and North Oakland County Planning Steering Committee (NOCPSC), is necessary for a full understanding of the case.

GDAHC's existence dates back to 1944 when it formed as an independent hospital council designed to allocate charitable contributions among hospitals in the manner that made the most effective use of the charitable funds. After passage of the Hill-Burton Act in 1946 (42 U.S.C. §§ 291, *et seq.*), GDAHC expanded its purpose to include aiding in the establishment of a coordinated community-wide approach to meeting the community's health care needs in the field of hospital care. Among GDAHC's stated functions was to advise and assist hospitals in their relations to federal, state and local government.

GDAHC's membership includes representatives of civic, business and labor organizations in southeastern Michigan, insurance companies, and nearly all of the hospitals in southeastern Michigan. Defendants concede that GDAHC believed the most efficient and cost-effective provision of health care services to the southeastern Michigan community could be achieved by working with existing hospitals, rather than by encouraging the development of new hospitals. This was a reflection of the belief that not only the physical plant, but also the physicians, other medical personnel and administrative staff of these existing hospitals, constituted an important resource for the community.

NOCPSC is a sub-group formed by GDAHC in 1969 whose only members were and are the four hospital defendants. NOCPSC's birth was the direct result of the Partnership for Health Amendments of 1967, which mandate state comprehensive health plans to:

> provide for assisting each health care facility in the State to develop a program for capital expenditures for replacement, modernization, and expansion which is consistent with an overall State plan developed in accordance with criteria established by the Secretary after consultation with the State which will meet the needs of the State for health care facilities, equipment, and services without duplication and otherwise in the most efficient and economical manner, ...

42 U.S.C. § 246(a)(2)(I)(i).

NOCPSC was one of numerous regional planning councils throughout southeastern Michigan sponsored by GDAHC. The purpose of these councils was to implement the goal of orderly planning through the sharing of information concerning future plans among hospitals located in the same State Plan sub-area.

Plaintiff claims that under the aegis of these legitimate organizations defendants developed and carried out an illegal plan to close the health care market in southeastern Michigan.

It is undisputed that in meetings of NOCPSC the hospital defendants shared information, made decisions, and reached agreements concerning the provision of health care services. Record support for this may be found in the depositions of Whitlow of POH, Zunker of Crittenton, Freysinger of PGH, and Schwartz of SJMH. Minutes of NOCPSC meetings also evidence this. In the minutes of the February 7, 1977 NOCPSC meeting, after the mention of plaintiff's upcoming February 23, 1977 CON review by CHPC-SEM, it is recorded that:

> ... It was generally agreed that the Pontiac area hospitals have a great deal at stake in what happens to health care in the Western Oakland area.
>
> In view of this, the Committee agreed that a sub-committee of the Planning Steering Committee (NOCPSC) should be formed to cooperatively plan for ambulatory services in the Western Oakland Area. It was felt that as a start each hospital should detail where it is in the consideration of facilities in the area. This could be done through the sharing of the written plans, which would be discussed at the subcommittee meeting. Beyond this, the subcommittee will need to look at all the available information on the area. Finally, the subcommittee must review the alternatives available to deliver services to the area.

On February 6, 1978, the hospital defendants, under the aegis of NOCPSC, passed a joint resolution pledging cooperation in the planning for the provision of ambulatory health care services. In particular, the resolution recognized the current plans and commitments of POH and PGH "as major steps towards increasing the availability and accessability of ambulatory health care services to residents of the service area."

In 1974, the hospital defendants met with GDAHC to engage in joint planning for the provision of obstetrical services and other areas of service with the express objective of determining reasonable methods of consolidating obstetrical services in the area. MDPH had imposed a *requirement* of joint planning on the

four hospital defendants in response to POH's proposal to provide obstetrical services, before MDPH would approve POH's CON in 1974.

GDAHC and CHPC-SEM have enjoyed frequent contact due to a prior working relationship from 1972-75 whereby GDAHC, under contract to CHPC-SEM, conducted the initial reviews of CON applications. In addition, both are located in the same building. From 1975 to 1977, contact relating to the CON review process continued in order to smooth the transition to CHPC-SEM's assuming complete responsibility for the review process. Further, GDAHC would relay its opinions on area hospitals' future plans to MDPH and CHPC-SEM as evidenced by letters concerning PGH from GDAHC to PGH, copies of which purportedly were sent to Carroll of CHPC-SEM and Reihmer of MDPH.

According to the affidavit of GDAHC member Verna Siller, GDAHC representative Holman told her that CHPC-SEM had "kicked back" Huron Valley's application for a Certificate of Need and that it would continue to kick back any further applications by Huron Valley.

Another piece of evidence plaintiff pinpoints as suggesting the existence of a conspiracy is a statement purportedly made by Parott, a CHPC-SEM representative, that obtaining a CHPC-SEM recommendation of approval on a CON application was merely a "data game" and depended mainly on "twisting the proper arms on [the] Executive Committee." (Affidavit of Jay Eldridge).

Carroll of CHPC-SEM has also testified in deposition that he frequently communicated with MDPH officials, including attending MDPH meetings in Lansing and speaking with Reihmer on occasion two or three times a day.

Reihmer testified at his deposition that in his capacity as an MDPH official he often conversed with GDAHC and CHPC-SEM representatives and state legislators at the time plaintiff filed its notice of intent. There is evidence that Reihmer discussed PGH's anticipated CON application with a state senator, and that, in his conversations with PGH representatives, concern was ex-

pressed that MDPH could not approve both plaintiff's and PGH's applications for CONs.

Plaintiff offers as circumstantial evidence of a conspiracy the fact that, after the state court ordered MDPH to issue plaintiff's CON, which ultimately also brought forth Section 1122 approval, CHPC-SEM through Carroll, PGH, POH, and SJMH all requested HHS to reconsider its Section 1122 approval. The Secretary did reconsider its decision, and subsequently withdrew Section 1122 approval. There is evidence that Carroll communicated with the hospital defendants and other on the topic of these requests for reconsideration. On March 3, 1983 Carroll wrote to Richard Zunker of Crittenton, referring to HHS' February 24, 1983 issuance of Section 1122 approval:

> Dear Dick,
>
> The enclosed is [for your information]. I find the decision to be incredible and I do not intend to let the matter rest. I'll be in touch with you on this.
>
> Terry

And, on April 25, 1983, Carroll wrote to Jack Whitlow of POH:

> Dear Mr. Whitlow,
>
> Reconsideration filed on behalf of St. Joseph Mercy Hospital (Pontiac) regarding the captioned project. [Huron Valley Hospital].
>
> It is my understanding that several hospitals are presently preparing further Requests for Reconsideration based on their own perspectives of the matter.
>
> Sincerely,
> /s/ Terrence E. Carroll

Carroll wrote a similar letter to the Oakland County Board of Commissioners. In addition, there is evidence that CHPC-SEM and Carroll urged Federal legislators and officials to encourage HHS to appeal this Court's mandamus order directing the Secretary to reinstate its previously issued Section 1122 approval.

By his actions, Carroll made clear he opposed approval of plaintiff's CON application. These activities included several local newspaper articles in which Carroll was reported to have remarked negatively on the prospect of plaintiff's construction, letters from Carroll to the UAW, Chrysler Corp., General Motors, Ford Motor Co., and Blue Cross/Blue Shield, urging them to file *amicus curiae* in the appeal of the Oakland County Circuit Court's ruling requiring MDPH to issue plaintiff's CON, and Carroll's opposition before Michigan's Water Resources Commission to its granting of a ground water discharge permit to plaintiff.

Defendants supply the Court with affidavits of four of the major actors in this saga. The contents of these affidavits are summarized as follows:

1. Terence Carroll (Executive Director of CHPC-SEM) states that he did not vote on plaintiff's application, and that his actions opposing plaintiff were authorized by CHPC-SEM Board of Trustees and were "based solely upon the policy of CHPC-SEM that the requested beds were unneeded in the service area and because the CHPC-SEM Executive Committee had recommended denial of a certificate of need to Huron Valley Hospital." Mr. Carroll further states he never explicitly or implicitly reached a "meeting of the minds with any state official or employee of the [MDPH]" regarding plaintiff's application and never reached such an agreement with any of the defendants.

2. Symond Gottlieb (Executive Director of GDAHC) describes GDAHC's evolution and character as follows:

   The board of directors and the membership of GDAHC were always composed of a majority of persons nominated by and representing groups other than hospitals. During the period 1956 through 1982, no more than 1/3 of the board of directors or the executive committee could be hospital executives.

3. Paul Massaron (former chairman of CHPC-SEM PIC) states that he quit the position and CHPC-SEM in

December 1978; he did not vote on plaintiff's application; he had no economic or other personal interest in any other hospital including PGH; he never discussed plaintiff's application with state officials or MDPH employees, and he never conspired or agreed with state officials or MDPH employees regarding plaintiff's application.

4. Richard Reihmer (a division chief of MDPH) states that beginning in 1974, his division and MDPH were instructed to review CON applications considering three policies: (1) no approval of new beds in areas overbedded according to the State Plan; (2) existing facilities seeking CONs to modernize would be preferred; and (3) "[CON] process would be utilized to remove existing beds from line only in the most extreme circumstances." MDPH enforced these policies prior to plaintiff's or PGH's applications and enforced them "without the influence of [GDAHC] or any of the four hospitals named as defendants in this case." Mr. Reihmer further states that his division's and MDPH's decision on plaintiff's application was unilateral and "*not* the result of or affected by any agreement or understanding with any of the non-MDPH defendants."

III. EVIDENCE OF CONSPIRACY

A. Summary of Litigants' Arguments.

Defendants' major argument is that, notwithstanding the evidence upon which plaintiff relies, a jury could not reasonably infer a conspiracy among defendants to exclude plaintiff from the relevant market.

Defendants argue that after massive discovery plaintiff is unable to present any direct evidence from which a jury could infer a conspiracy. They contend that all of the evidence is equally representative of cooperative efforts aimed at efficient health care

planning, which is sanctioned, and even encouraged, under federal and state legislation.

The Court has reviewed the results of massive discovery, consisting of some 300 exhibits and 50 depositions, and finds that plaintiff has been unable to pinpoint any facts establishing that a conspiracy actually existed. Defendants point out that plaintiff Martin Trepel, who heads the Huron Valley Hospital operation, admitted he had no information that an agreement was reached among defendants. They further cite the testimony of Dr. J.J. Johnstone, who has been a member of plaintiff's Board since 1977:

Q. [A]re you aware of any evidence of the existence of a conspiracy?

A. Of any actual evidence?

Q. Yes.

A. Only innuendos.

. . . . .

Q. What innuendos did you hear or become aware of?

A. Well, we got a little paranoid when we were turned down for a certificate of need.

Finally, defendants point out that representatives of each defendant have denied the existence of an agreement or conspiracy designed to injure plaintiff or close the market for health services.

Plaintiff concedes that it has no direct evidence of conspiracy, but argues that the evidence and testimony that it has presented is such that a reasonable jury could infer existence of a conspiracy. At oral argument, counsel for plaintiff suggested that the Court consider the opportunities for collusion available to defendants, the defendants' plausible motive to exclude plaintiff, their continuing cooperative activity, and the fact that plaintiff had trouble procuring regulatory approval. Plaintiff's counsel argued that all this put together added up to a material issue of fact as to the existence of a conspiracy.

Citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), plaintiff points out that the lack of direct evidence of conspiracy is a common occurrence, as is the practice of inferring conspiracy from circumstantial evidence.

B. The Law

The Supreme Court's most recent pronouncement on summary judgment motions in the antitrust context is *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, U.S. , 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In *Zenith*, American television manufacturers sued 21 Japanese corporations who manufactured and sold televisions, alleging a predatory pricing conspiracy. The *Zenith* plaintiffs' theory was that the defendants had conspired to sell at artificially high prices in Japan and to sell at artificially low prices in the U.S. in order to drive plaintiffs out of the American market. The defendants' pricing practices in Japan would subsidize their profit-losing practices in the U.S. In addition to evidence of a conspiracy to raise prices in Japan, the *Zenith* plaintiffs relied on evidence that defendants agreed to fix minimum prices in the U.S. market and that defendants agreed to limit to five the number of distributors in the U.S. market which each defendant could use.

In *Zenith*, the Third Circuit had referred to the above-referenced evidence as direct evidence of the alleged conspiracy and therefore had reversed the district court's grant of summary judgment for defendants. The Supreme Court reversed and remanded, stating:

> On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must "tend[] to exclude the possibility" that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy. *Monsanto*, 465

> U.S., at 764, [104 S.Ct. at 1470], ... In the absence of such evidence, there is no "genuine issue for trial" under Rule 56(e), and petitioners are entitled to have summary judgment reinstated.

Zenith U.S. at , 106 S.Ct. at 1362, 89 L.Ed.2d at 559.

The *Zenith* Court found the evidence upon which the Third Circuit had relied insufficient to raise a jury question because that evidence was ambiguous, and because there was an absence of motive for defendants to engage in the alleged predatory pricing conspiracy. The evidence was ambiguous because it was as plausible that the conduct involved was undertaken for independent business reasons as that it was part of a conspiracy to undercut plaintiffs. Motive was lacking because predatory pricing conspiracies, to succeed, must continue for long periods of time during which the conspirators suffer lost profits, along with their victim, with the hope that ultimately it will pay off. The Court observed that, if the factual context makes the claim of conspiracy implausible, i.e. economic nonsense, then plaintiffs "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Zenith*, U.S. , 106 S.Ct. at 1356, 89 L.Ed.2d at 552.

Zenith clearly applies beyond the context of predatory pricing allegations. Justice Powell wrote, "This case requires that we again consider the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case." *Zenith*, U.S. at , 106 S.Ct. at 1351, 89 L.Ed.2d at 546. The Court also noted that, even where there is a plausible motive to conspire, its prior decision in *Monsanto Co. v. Spray-Rite Service Corp., supra*, "establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Zenith* U.S. at n.21, 106 S.Ct. at 1362 n.21, 89 L.Ed.2d at 559, n. 21. More expansively, the Court stated:

> But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co.* ... we held that conduct as consistent with

> permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.... See also [*First National Bank of Arizona v.] Cities Service* [, 391 U.S. 253, 88 S.Ct. 1757, 20 L.Ed.2d 569], ... To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. [*Monsanto*, 465 U.S., at 764, 104 S.Ct. at 1470]. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. See *Cities Service* ...

Id., U.S. at , 106 S.Ct. at 1357, 89 L.Ed.2d at 553 (citations omitted).

In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), the Supreme Court held that it was insufficient evidence of a conspiracy between a manufacturer and its distributors to fix prices, to show that defendant manufacturer had terminated its contract with the plaintiff, a former distributor, following the defendant manufacturer's receipt of complaints from other distributors of plaintiff's price-cutting practices. *Monsanto* held that circumstantial evidence consisting of plausibly legitimate, independent conduct by alleged co-conspirators is insufficient to create a jury question unless there is more evidence of conspiracy to supplement it and to exclude the possibility of independent conduct.

In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), the Court affirmed the award of summary judgment for the anti-trust defendant because plaintiff's circumstantial evidence of defendant's involvement in the alleged conspiracy was ambiguous. There, plaintiff's evidence was defendant's refusal to buy Iranian oil from plaintiff, although plaintiff's offer was highly competitive. However, in light

of evidence that others in the oil market had agreed to retaliate against those who brought Iranian oil, the Supreme Court held the plaintiff had failed to establish a material issue of fact that the alleged conspiracy existed. *Id.* at 280, 88 S.Ct.at 1588. The Court found that, considering defendant's evidence, its failure to deal resulted from non-conspiratorial motives, and there was no question for the jury on the issue of conspiracy.

The Supreme Court has consistently cautioned courts to be careful in granting summary judgment in antitrust cases, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *Cities Service, supra*; *Zenith, supra*. But in *Anderson v. Liberty Lobby, Inc.*, U.S. , 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), where the public figure libel plaintiff argued summary judgment should not readily be granted where intent and state of mind are at issue, the Court clarified its warning.

> We do not understand *Poller*, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Based on that Rule, *Cities Service*, ... held that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without offering "any significant probative evidence tending to support the complaint." As we have recently said, "discredited testimony is not [normally] con-

> sidered a sufficient basis for drawing a contrary conclusion." ... *Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery.* We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

Id., U.S. at , 106 S.Ct. at 2513-14 at 216-217 (citations omitted) (emphasis added).

The Sixth Circuit has stated the applicable standard for summary judgment in an antitrust case in *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942 (6th Cir. 1983). *Smith* acknowledges that the Supreme Court has cautioned hesitancy in granting summary judgment for antitrust defendants and has encouraged leniency in the court's examination of the antitrust plaintiff's evidence. However, the court also expressed an approach consistent with *Zenith*, saying:

> The lesson learned from *Poller* and *[Cities Service]* is that, although the court should treat antitrust plaintiffs leniently in examining their proofs for issues of fact on a summary judgment motion, those proofs must nonetheless provide some factual basis upon which the conspiracy and intent elements may be reasonably inferred. Once the defendant has adequately rebutted the plaintiff's allegations be establishing legitimate alternative explanations for its conduct which disprove the inferences the plaintiffs seek to draw, then the plaintiffs must come forward with some "significant probative evidence tending to support the complaint."

Id. at 948. (footnotes and citations omitted). *See also Potters Medical Center v. City Hospital Assoc.*, 800 F.2d 568 (6th Cir. 1986).

The mass of legislation regulating the health care industry cannot be summarized in capsule form. However, a few salient points should be highlighted. In the field of health care planning, Congress had made clear that such planning requires active cooperation and joint activity among health care providers. The Comprehensive Health Planning and Public Health Services Amendments, 42 U.S.C. § 201 *et seq.*, providing federal grants to states with conforming comprehensive health plans, include the following provision:

> In order to be approved for purposes of this subsection, a State plan for comprehensive State health planning must ... *provide for encouraging cooperative efforts among governmental or nongovernmental agencies, organizations and groups concerned with health services, facilities, or manpower*, and for cooperative efforts between such agencies, organizations, and groups and similar agencies, organizations, and groups in the fields of education, welfare, and rehabilitation; ...

42 U.S.C. § 246(a)(2)(D) (Supp.1986) (emphasis added).

In the preamble to the National Health Planning and Resources Development Act (NHPRDA) of 1974, Congress made the following finding:

> Since the health care provider is one of the most important participants in any health care delivery system, health policy must address the legitimate needs and concerns of the provider if it is to achieve meaningful results; and, thus, it is imperative that the provider be encouraged to play an active role in developing health policy at all levels.

42 U.S.C. § 300k(a)(5)(Supp.1986).

Also under the NHPRDA, the "primary responsibility" of each health service agency is "effective health planning for its health service area and the promotion of the development within the area of health services, manpower, and facilities which meet identified needs, reduce documented inefficiencies, and imple-

ment the health plans of the agency." 42 U.S.C. 300*l*-2(a). CHPCSEM is the health service agency for Service Area 76, which is the area concerned in this litigation.

The NHPRDA lists as one function of a health service agency "preventing unnecessary duplication of health resources." 42 U.S.C. § 300*l*-2(a)(4). Further, under Section 300*l*-2(c)(1), the health service agency is to "seek, to the extent practicable, to implement [its plans, formulated pursuant to other sections of the Act] with the assistance of individuals and public and private entities in its health service area."

Amendments in 1979 to NHPRDA were aimed at ensuring that competition in the health care market would continue, not withstanding statutorily authorized cooperation. However, in the context of inpatient health services, the NHPRDA continued to express Congress' view that "competition does not or will not appropriately allocate supply" and therefore "health systems agencies ... should ... take actions ... to allocate the supply of such services." 42 U.S.C. § 300k-2(b)(2). This contrasts with Section 300k-2(b)(3), applicable to health services other than inpatient that directs agencies to "give priority ... to actions which would strengthen the effect of competition on the supply of such services." *See also National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 383-88, 101 S.Ct. 2415, 2419-21, 69 L.Ed.2d 89 (1981); *Hospital Building Co. v. Trustees of Rex Hospital*, 691 F.2d 678, 684-85 (4th Cir. 1982), *cert. denied* 464 U.S. 890, 104 S.Ct. 231, 78 L.Ed.2d 224 (1983).

Also relevant to this litigation is the body of state regulation of the health care industry. In particular, two points should be noted. First, the 1975-76 Michigan State Plan projected a situation of overbedding for Service Area 76. It was estimated that, even without plaintiff's facility, the area would have around 150 excess beds. Second, in 1978, the Michigan legislature enacted new CON law. The prior CON law is concededly relevant to the procedures in this case. However, one aspect of the new law was to establish an excess hospital capacity reduction program. M.C.L.A. §§ 333.22154, 333,22156. This required MDPH to

devise a list of significantly overbedded areas (25 or more beds in excess of need). Until an area on the list prepared a plan for reduction of its excess, the statute prohibited MDPH from issuing a CON to any hospital applying in that area. M.C.L.A. § 333.22156.

C. CONCLUSION

After exhaustive discovery, plaintiffs most persuasive evidence -- all circumstantial -- of the antitrust conspiracy it alleges is:

1. The explicit cooperation among hospital defendants under the aegis of NOCPSC, manifested in joint resolutions of further cooperation and for the provision of ambulatory health care services, and agreements in 1978 to voluntarily reduce the number of hospital beds in each hospital defendant's facility.

2. The exercise of a clear preference for existing facilities in the evaluation by MDPH of plaintiff's application for a certificate of need that appears to have resulted in denying plaintiff's CON in favor of Pontiac General Hospital's expected application.

3. Procedural improprieties in the administration of the CON law, which ultimately led the Michigan courts to order issuance of a CON to plaintiff.

4. CHPC-SEM director Carroll's energetic activities.

5. Siller's affidavit to the effect that GDAHC director Holman had told her CHPC-SEM would continue to kick back plaintiff's application.

6. Eldridge's affidavit to the effect that CHPC-SEM representative Parrot said that obtaining a recommendation of approval from CHPC-SEM was merely a "data game" and depended mainly on "twisting the proper arms on the Executive Committee."

To a large extent, plaintiffs base their argument that a jury could infer an illegal conspiracy on the existence and activities of defendants GDAHC and NOCPSC. The court may assume these

entities created a chilly environment in the health care market for hopeful new entrants such as plaintiff. However, this Court finds the existence and activities of GDAHC and NOCPSC not only legal, but encouraged under health planning legislation.

As indicated earlier, GDAHC is an education-oriented private organization originally formed in 1944. In 1946, Congress enacted the Hill-Burton Program that was designed to promote more efficient provision of health care services. Thereafter, a major function of GDAHC was to advise and assist local hospitals in furtherance of the goals of the Hill-Burton Act. Although it is not entirely clear from the briefs, it appears that until the adoption of the NHPRDA in 1974, GDAHC, as a local health planning council, was eligible for federal funding under the Comprehensive Health Planning and Public Health Services Amendments of 1966, specifically under 42 U.S.C. § 246(b). In response to the same statute, specifically the Partnership for Health Amendments of 1967, GDAHC sponsored the formation of NOCPSC and other regional planning councils in Southeastern Michigan to implement the goals of orderly planning, elimination of duplicative and overlapping health services, and efficient provision of health care services.

While provisions for Federal funding were allowed to lapse with the adoption of the NHPRDA in 1974, the underlying statutory provisions remain in effect. For example, 42 U.S.C. § 246(a)(2)(I)(i) mandates state comprehensive health plans to assist health care providers in developing programs that will advance the state plan to "meet the needs of the state for health care facilities, equipment and services without duplication and otherwise in the most efficient and economical manner ..." See also 42 U.S.C. § 300k(a)(5), *supra*; 42 U.S.C. § 300*l*-2(c)(1), *supra*. Finally, as mentioned above, Congress, in Section 300k-2(b)(2), recognized that, as concerns inpatient health services, "competition does not or will not appropriately allocate supply" and therefore "health systems agencies ... should ... take actions ... to allocate the supply of such services."

The legislation regulating the health care industry does not explicitly require the existence of GDAHC and NOCPSC. However, the health care planning that the statutes envision would be impossible or ineffective without meetings among health care providers for the sharing of information and cooperation in plans for providing health care services. *See Hospital Building Corp. v. Trustees of Rex Hospital, supra.*

In the case at bar, it is clear that the defendants, particularly the hospitals, were cooperating among themselves, were engaging in joint activity and were not acting independently in the strict sense. However, there is no significant evidence that the joint planning activity undertaken was other than pursuant to the statutory scheme calling for such cooperation in the health care field. Allowing plaintiff to go to trial without more than this circumstantial evidence of legitimate cooperation among defendants may impede the operation of legislation designed to promote efficient and economical provision of health care services. As in *Zenith*, this case calls for hesitancy in allowing a potentially mistaken inference of conspiracy. The *Zenith* court, dealing with an alleged predatory pricing conspiracy, noted that cutting prices "often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly because they chill the very conduct the antitrust laws are designed to protect." *Zenith*, _____ U.S. at _____, 106 S. Ct. at 1360, 89 L.Ed.2d at 557. Similarly, here, allowing the case to go to the jury without more direct evidence of conspiracy may have a chilling effect on the very conduct health-planning legislation encourages.

Specifically, the agreement among hospital defendants voluntarily to reduce excess beds, while evidence of cooperation, can hardly be treated as circumstantial evidence of a conspiracy to exclude plaintiff from the market. This is because, under Michigan's CON law effective in 1978, unless reduction of excess beds occurred, there would have been a moratorium on the approval of CONs for the relevant service area. In other words, as defendants pointed out at oral argument, each hospital had a reason independent of plaintiff's entry into the market for agreeing to reduce its number of beds. Unless such a reduction took

place, each hospital would be unable to gain approval of future applications for CONs it might file.

Plaintiff's evidence that MDPH, in reviewing plaintiff's application for CON, entertained a preference for existing improprieties may reflect poor administration of Michigan's CON law. However, according to the affidavit of Richard Reihmer of MDPH, the preference for existing facilities was a criterion MDPH had been instructed to apply beginning in 1974. Further, Reihmer states that MDPH enforced these policies prior to plaintiff's or PGH's applications without any influence from GDAHC or the hospital defendants. The Court finds the mere existence of the preference and apparent administrative bungling in the processing of plaintiff's application would not justify a jury in inferring the existence of a conspiracy.

As for Carroll's activities, while perhaps he was on some sort of vendetta, evidence is lacking that it was any more than personal or on behalf of CHPC-SEM after that organization had arrived at an official stance on plaintiff's application. Plaintiff asserts that Carroll orchestrated opposition to plaintiff, but the evidence shows only that he performed all activities publicly. Carroll let all entities involved know what he was doing on behalf of CHPC-SEM with regard to plaintiff's application. The Court feels a reasonable jury could not conclude, from the evidence of one man's actions and statements directed against plaintiff, that there existed a conspiracy among up to 14 defendants to exclude plaintiff from the health care market.

Finally, the statements made according to the affidavits of Sillers and Eldridge, while far from admirable, may well reflect nothing more than off-hand statements. In any case, these two isolated statements hardly justify concluding there is a material issue of fact as to the existence of a conspiracy of the proportions plaintiff alleges.

In other contexts, the amount of cooperation and joint activity among defendants in this record might justify sending the case to the jury. However, in the context of health care regulation, plaintiff is obliged to come forward with more than cir-

cumstantial evidence of cooperation among defendants in order to create a material question of fact for the jury. This it has not done. The evidence upon which plaintiff relies is too ambiguous to permit a jury to find defendants engaged in an antitrust conspiracy rather than in the joint planning activity envisioned in federal and state health care legislation.

It is therefore clear that the extensive evidence developed at deposition and in discovery is not sufficient to justify putting this case to the jury against the defendants who are movants here. These defendants' joint activity does not create a factual antitrust jury issue because the activity was cooperation equally suggestive of compliance with legislation encouraging joint planning in the health field as with antitrust conspiracy. Nor can these defendants be held liable for MDPH's procedural improprieties evidenced in the processing of plaintiff's CON application. The state defendants and the MDPH are not participants in this motion, and their activities are not subjects of consideration here.

It therefore appears clear that defendants are entitled to summary judgment on the antitrust claim. The Court will, however, consider defendants' claim under *Noerr-Pennington*, even though decision under *Noerr-Pennington* is not necessary to a disposition of the antitrust claim.

IV. NOERR PENNINGTON ANTITRUST IMMUNITY

As alternative support for their motion for summary judgment, defendants claim entitlement to antitrust immunity under the *Noerr-Pennington* doctrine, which holds that joint efforts to influence public officials do not violate the antitrust laws, even though intended to eliminate competition. The doctrine is intended to preserve the First Amendment right to petition the government. It is set forth in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L.Ed.2d 626 (1965); and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L.Ed.2d 642 (1972).

In this Court's prior opinion in *Huron Valley Hospital v. City of Pontiac*, 612 F. Supp. 654 (E.D. Mich. 1985), it dealt with a motion for immunity under *Noerr-Pennington* made by these defendants. The Court held:

> [A]n exception to this doctrine has been created where the attempt to influence government is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." ... The allegations in this case go beyond the mere filing of one lawsuit, which the Sixth Circuit recently found protected under the *Noerr-Pennington* doctrine in *City of Cleveland v. Cleveland Electric*, 734 F.2d 1157 (6th Cir. 1984), but are more analogous to the sort of abuse of process in bringing access to agencies or courts that the court stated would fall within the sham exception.
>
> The Second Circuit held in *Litton Systems, Inc. v. AT&T*, 700 F.2d 785, 809 n.36 (2d Cir. 1983) that the sham exception to the *Noerr-Pennington* doctrine is applicable in the situation known as "agency capture," where the regulated become the regulators. This is precisely the situation *alleged in the complaint in this action*, and, *taking the allegations as true for the purpose of this motion*, as the Court must, the Court finds that *Noerr-Pennington* does not apply to these defendants, and does not provide a basis for dismissal.

Id. 663-64 (emphasis added).

That determination was based on the pleadings and not on a thoroughly developed record, which the Court has now.

Defendants recognize that plaintiff's complaint boils down to allegations of a conspiracy to deny plaintiff meaningful access to the health care regulatory process. Defendants concede that, were that the case here, *Noerr-Pennington* immunity could not be claimed. Defendants contend, however, that plaintiff has failed to come forward with evidence from which a reasonable jury could infer that defendants' actions corrupted the regulatory processes.

Plaintiff, on the other hand, argues that defendants' activity constituted a sham undeserving of *Noerr-Pennington* immunity from antitrust liability. Plaintiff also argues that defendants requested HHS's reconsideration of Section 1122 approval solely to delay the Huron Valley Hospital project, that government officials participated in the conspiracy to delay or prevent Huron Valley from entering the market, and that the established preference for preserving existing hospitals effectively denied plaintiff meaningful access to the regulatory process. Plaintiff contends that all such activities constituted a sham rather than legitimate efforts to influence the government protected under the *Noerr-Pennington* doctrine.

In *Noerr*, the Court found there could be no antitrust liability where the plaintiffs, a group of truckers, claimed defendants, a group of railroad companies, conspired to engage in a joint publicity campaign designed to encourage promulgation of laws and law enforcement practices detrimental to the truckers and their business. The Court held that Congress did not intend the Sherman Act to operate as a restriction on political activity, and even if it were intended to restrict such activity, it would infringe on antitrust defendants' First Amendment rights.

In *Pennington*, the Court extended the *Noerr* holding to concerted activity aimed at influencing executive agencies. There the Court found there could be no antitrust liability where the plaintiff, a coal mining company, alleged the union and several large coal operators had committed antitrust violations by acting in combination to persuade the Secretary to Labor [sic] to enforce a minimum wage regulation in such a way as to adversely affect plaintiff, potentially eliminating it from competition.

The Court extended the *Noerr-Pennington* doctrine to joint efforts to petition state and federal courts in *California Motor Transport Co. v. Trucking Unlimited*, *supra*, and established the "sham" and "co-conspirator" exceptions. The Court stated the *Noerr Pennington* defense is inapplicable:

> where the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to inter-

> fere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."

Id., 404 U.S. at 511, 92 S. Ct. at 612.

The *Noerr-Pennington* doctrine rests on two grounds: The First Amendment's protection of the right to petition the government, and the recognition that a representative democracy depends upon the ability of people to make known their views and wishes to the government. The sham exception arises only when the alleged conspiracy is a mere sham to cover an attempt to interfere directly with the business relations of a competitor, and not to properly petition the government or administrative agencies for relief.

The Sixth Circuit has recently dealt with *Noerr-Pennington* immunity in two cases, *Westmac, Inc. v. Smith*, 797 F.2d 313 (6th Cir. 1986), and *Potters Medical Center v. City Hospital Association*, 800 F.2d 568 (6th Cir. 1986).

In *Westmac*, the Sixth Circuit affirmed the district court's grant of summary judgment to defendants based on the defendants' claimed immunity under *Noerr-Pennington*. Plaintiff sued defendants, charging antitrust violations. The focus of the case concerned defendants' opposition to plaintiff's effort to obtain special tax benefit bond financing of a grain elevator. Plaintiff charged defendants with pursuing and conducting lobbying and litigation activities for the express purpose of forcing plaintiff to joint [sic] an anticompetitive price maintenance conspiracy, or, if that failed, to damage plaintiff economically by reducing or destroying its ability to compete. The Court of Appeals affirmed the district court's holding that no genuine issue of material fact existed respecting whether defendants' lobbying and litigation activities were genuine attempts to influence the official decision making protected by the *Noerr-Pennington* doctrine.

The *Westmac* court held that the sham exception is a narrow one applicable only when the activity corrupts governmental processes to such an extent that it constitutes access barring conduct of the sort described in *California Motor*:

> We also agree with the rationale of *Razorback [Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484] that the sham exception is a "narrow one" and "is applicable when the activity in question corrupts governmental processes to such an extent that it constitutes access barring conduct of the sort described in *California Motor* .... We further agree with that court's reasoning that "the key to the 'sham exception' is an improper interference with governmental process."
>
> . . . . . .
>
> We hold that when a lawsuit raises a legal issue of genuine substance, it raises a rebuttable presumption that it is a serious attempt to obtain a judgment on the merits instead of a mere sham or harassment. The first amendment interests concerned and the case law discussed earlier support placing the evidentiary burden on the antitrust plaintiff to prove that the action of the defendant comes within the sham exception to *Noerr-Pennington* in this kind of case.

Id. at 318.

In *Potters Medical Center*, the court held that that the defendant hospital was insulated from antitrust liability under the *Noerr-Pennington* doctrine. The defendant hospital had opposed its competitor's Section 1122 application, and had participated in litigation challenging the competitor's affiliate's acquisition of equipment and commencement of a building program without obtaining a certificate of need. The court held that the Hospital's activities were precisely the type of conduct intended to be insulated by *Noerr-Pennington*, and not within the sham exception. It also held that, on that issue, summary judgment was allowable. The court said:

> On these undisputed facts, City Hospital's conduct did not rise to "a pattern of baseless, repetitive claims" or "abuse of processes" necessary to constitute sham activity, *California Motor Transport*, 404 U.S. at 513 [,92 S. Ct. at 613], or even create an inference of such. City

> Hospital was exercising its First Amendment right to petition the government; even if its conduct was accompanied by an "overall intent" that was "anti-competitive" and "hostile" as charged in Potters' brief, such advocacy was precisely the type of conduct protected by the *Noerr-Pennington* doctrine. "...[I]nsofar as [its] campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." *Noerr*, ...

Id. at 579.

And, as pointed out in *Potters Medical Center*, quoting from *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1156 (7th Cir.) *cert. denied* 464 U.S. 891, 104 s. Ct. a t 234, 78 L.Ed.2d 226 (1983).

> Without a doubt, the intention to harm a competitor is *not* sufficient to make litigation or administrative proceedings a sham. That competitive motive is the very matter protected under *Noerr-Pennington*. Rather, the requisite motive for the sham exception is the intent to harm one's competitors not by the result of the litigation but by the simple fact of the institution of litigation.

Potters Medical Center, at 1162 (emphasis in original).

It is plaintiff's basic contention that the defendants conspired to use the regulatory process to further their goal of excluding plaintiff from the health care market. Defendants respond by pointing out that the use of the regulatory process constituted activity protected from antitrust liability under *Noerr-Pennington*. The plaintiff, in rebuttal, claims the defendants' action was a sham, and, therefore, they are entitled to no *Noerr-Pennington* protection. There is no question that, when plaintiff's CON application was pending, there were numerous contacts between MDPH officials, CHPC-SEM officials, GDAHC officials, and representatives of the four hospital defendants, and there is no question but that the various hospital defendants and GDAHC strongly urged CHPC-SEM to recommend denial of plaintiff's application

to MDPH. The Court can further assume that defendants agreed among themselves to engage in such lobbying with hopes that they would prevent the plaintiff from joining them in the market for health care services.

However, such activity would be clearly protected under *Noerr-Pennington*. *Potters Medical Center* makes clear that a health care provider's expression to a local health services agency of its opposition to the regulatory approval of a potential competitor's application cannot form the basis for antitrust liability. Futhermore, it is clear that the *Noerr-Pennington* doctrine protects the petitioning to MDPH, the agency vested with the authority to make a binding decision on plaintiff's application. These cases shield from the Sherman Act a concerted activity to influence public officials, and joint efforts to influence public officials do not violate the antitrust laws, even though intended to eliminate competition. The only exception to this rule is the sham exception, and it is clear here that the sham exception does not apply.

It is further claimed by the plaintiff that the various defendants' requests to the Secretary of Health & Human Services to reconsider the approval of plaintiff's Section 1122 application constituted sham activity undertaken solely to delay plaintiff's project. However, the Court finds that after extensive discovery plaintiff has failed to come forward with any evidence that would create a material issue of fact as to the bona fides of defendants' actions. Furthermore, the Court finds that plaintiff has failed to produce evidence rebutting the *Westmac* presumption.

Finally, plaintiff contends that, by their conduct, defendants succeeded in denying plaintiff meaningful access to the regulatory process. Perhaps the most serious allegation is that MDPH officials were part of a conspiracy to prevent plaintiff's entry into the market. Because of this alleged official involvement in the conspiracy, plaintiff argues defendants cannot claim *Noerr-Pennington* immunity. Similarly, plaintiff argues the preference for existing facilities and the presence of Massaron, a PGH advocate, on a CHPC-SEM Committee considering plaintiff's application

made it impossible for plaintiff to pursue regulatory approval with any hope of success.

The concept that *Noerr-Pennington* immunity is inapplicable to activities intended to bar one's competitor from meaningful access to legal process originated in *Trucking Unlimited, supra*. It was in that case, too, that the Court suggested that a conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. This developed into the so-called coconspirator exception to *Noerr-Pennington* immunity. Clearly, however, the rationale behind that exception is that the involvement of a public official in the conspiracy against an antitrust plaintiff almost necessarily prevents the victim from availing itself of normal procedures to enter the market. *See Garst v. Stoco, Inc.* 604 F. Supp. 326, 332 (E.D. Ark. 1985).

The flaw in plaintiff's reliance on the coconspirator exception in this Court's view is that the plaintiff has failed to produce any evidence creating a material issue of fact as to whether MDPH officials conspired with any of the defendants now before this Court. Plaintiff makes much of the fact that MDPH followed CHPC-SEM's recommendation that plaintiff's CON application be denied. But defendants have supplied the Court with the sworn testimony of MDPH officials that MDPH's decision on plaintiff's application was not the result of an agreement or conspiracy between MDPH and the defendants.

This Court cannot agree with plaintiff that the preference for existing facilities denied plaintiff meaningful access to the regulatory process, and therefore dissolves defendants' immunity under the *Noerr-Pennington* doctrine. While the preference obviously operated to plaintiff's detriment, there is no evidence it was the result of activity by the moving defendants that barred plaintiff's access by corrupting the governmental processes.

Finally, the Court is unable to see how the presence of Massaron on CHPC-SEM committees considering plaintiff's application could have barred plaintiff from meaningful access to the regulatory process. Massaron was a UAW representative who advocated, on behalf of the UAW, a certain position concerning

PGH. The Court notes that by law the composition of CHPC-SEM's governing body and subcommittees had to consist of at least 40 per cent health care provider representatives. 42 U.S. § 300*l*-l(b)(3)(C). Since the statutory scheme envisions the presence of persons with vested interests in specific institutions, this Court cannot see how Massaron's presence, even assuming he strongly supported PGH, denied plaintiff meaningful access to the entire regulatory process. Furthermore, the evidence shows that Massaron abstained in the votes of the two CHPC-SEM committees that resulted in CHPC-SEM's recommendation to MDPH that plaintiff's CON application be denied.

V. PLAINTIFF'S CLAIM UNDER 42 U.S.C. § 1983

Count II of plaintiff's complaint charges the four hospital defendants, Massaron, Carroll, and the four state defendants with violating 42 U.S.C. § 1983.[5] All of these defendants, except the state defendants, now move for summary judgment.

In *Huron Valley Hospital v. City of Pontiac*, 612 F.Supp. 654, this Court dealt with a prior motion under Section 1983, and held upon the allegations made in the pleadings that the motion should be denied under *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). *Adickes* held that "private persons jointly engaged with state officials in the prohibited action, are acting 'under color' of state law for purposes of the Statute.... It is enough that [the accused] is a wilful participant in joint activity with the state and its agents."

Since the rendering of that opinion, there has been extensive discovery. The facts developed by this extensive discovery now es-

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[5] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

tablish that summary judgment should be granted on the Section 1983 count in favor of the moving defendants.

To prevail in a Section 1983 suit, the plaintiff must establish the defendant acted under color of state law. The parties before this Court agree that, because only the private defendants are moving for summary judgment, to show "state action" plaintiff must establish that there was a conspiracy between the private defendants and state officials to deprive plaintiff of its rights under the United States Constitution.

Many of the facts relevant to the antitrust count are relevant to this count. However, here, the focus must be on evidence of conspiracy between the private defendants and the state officials. For the purposes of this motion, the state official whose actions are most seriously implicated are those of Richard Reihmer.

It is clear that, from March to July 1977, before the denial of plaintiff's application for a CON, MDPH officials discussed with representatives of the hospitals in the relevant service areas the impact of plaintiff's application on existing facilities. Also, it is evident that Reihmer, of MDPH, often conversed with representatives of CHPC-SEM at the time plaintiff's application was pending.

It is also true that Michigan courts have found that, in evaluating and processing plaintiff's application, MDPH illegally relied upon unpromulgated criteria favoring existing facilities. There is also evidence that Carroll frequently communicated with MDPH officials and attended MDPH meetings in Lansing in his capacity as director of CHPC-SEM. Finally, plaintiff points out that a new planning analyst at MDPH, with relatively little experience, was charged with reviewing plaintiff's application, and that the final decision of MDPH denying plaintiff's application contains significant verbatim excerpts from the CHPC-SEM staff analysis that had recommended against granting a CON to plaintiff.

By affidavit, Carroll and Massaron have explicitly denied the existence of any agreement or conspiracy between them and state officials regarding plaintiff's applications. Representatives of

each of the hospital defendants have likewise denied the existence of a conspiracy. Finally, by affidavit, Reihmer has asserted that his and MDPH's decision on plaintiff's application was unilateral, and not the result of any kind of an agreement with any of the private defendants.

Authority for the proposition that a civil rights plaintiff may demonstrate state action through proof of a conspiracy between private and state actors is found in *Adickes v. S.H. Kress & Co.*, supra.[6]

Adickes involved the arrest of a white school teacher who was refused service in respondent's lunchroom when she was accompanied by six black students. She was arrested for vagrancy by the Harrisburg [sic], Mississippi police when she left the premises. The Supreme Court found sufficient evidence of state action to create an issue of fact, and ruled that private persons jointly engaged with state officials are acting under color of state law for the purposes of 42 U.S.C. § 1983.

But *Adickes* makes clear that the plaintiff must show not only joint activity but joint activity directed against the plaintiff. The Court said:

> Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes.

Id. at 152, 90 S.Ct. at 1605

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[6] *See also United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1156, 16 L.Ed.2d 267 (1966) where the Court said: "To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." (footnote omitted).

While it is not necessary for the plaintiff to prove that each participant in a conspiracy knew the exact parameters of the plan, it must be demonstrated that the private defendants and the [sic] the government officials at least shared the general conspiratorial objective. In *Fonda v. Gray*, 707 F.2d 435 (9th Cir.1983), plaintiff sued the government and two banks alleging a conspiracy to suppress her out-spoken political views. The district court granted summary judgment, and the court of appeals affirmed, holding that mere acquiescence of bank employees to the request of the Federal Bureau of Investigation to view plaintiff's bank account was insufficient under Section 1983 to prove conspiracy between the banks and the government to deprive plaintiff of her constitutional rights. The court said:

> To prove conspiracy between private parties and the government under § 1983, an agreement or "meeting of the minds" to violate constitutional rights must be shown.... The mere acquiesence of the bank employees to the investigation request of the FBI to view Fonda's bank records is, without more, insufficient to prove conspiracy. While it is not necessary to prove that each participant in a conspiracy know the exact parameters of the plan, they must at least share the general conspiratorial objective.... The FBI investigation may have been part of a bad faith effort to curb Fonda's antiestablishment conduct, but this, without more, will not suffice to make the banks liable. The argument that the banks had a duty to learn of the allegedly unlawful objectives of the FBI investigation is without merit. While a breach of the duty a bank owes to its depositor may give rise to contractual or tort liability, it surely is not, in and of itself, sufficient to prove the banks intended to join or to further the broad conspiratorial objective of curbing Fonda's political speech.

Id. at 438.

And, in *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204, 1206 (7th Cir. 1980), the court, discussing the *Adickes* concept of

conspiracy for the purpose of Section 1983 state action, said, "It is not sufficient to allege that the [private and state] defendants merely acted in concert or with a common goal. There must be allegations that the defendants had directed themselves towards an unconstitutional action by virtue of a mutual understanding."

It is therefore apparent that, with exhaustive discovery complete, plaintiff's evidence is not sufficient to justify a jury in finding a conspiracy between the private defendants and the state actors to violate plaintiff's civil rights. There may be no Section 1983 action in this case like this unless such conspiracy can be found because only then may it be said that "The alleged infringement of federal rights [is] 'fairly attributable to the state'", *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 2769, 73 L.Ed.2d 418 (1982).[7]

Plaintiff has repeatedly alleged that state officials and the private defendants agreed to grant PGH its CON and to deny plaintiff's application. Plaintiff has buttressed these allegations with evidence of interaction among the actors. But interaction is anticipated in state and federal health planning legislation. The evidence plaintiff presents is insufficient to allow a jury to conclude there existed a conspiracy to keep the plaintiff out of the market by unconstitutional means, in violation of 42 U.S.C. § 1983.

Under 1972 P.A. 256, M.C.L.A. § 331.456(b), the Michigan Certificate of Need Law, MDPH was directed to seek the recommendation of CHPC-SEM on plaintiff's CON application. Further, under NHPRDA and Section 1122, CHPC-SEM, as the local health services agency, was required to submit a recommendation to MDPH with regard to each health facility capital expenditure

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[7] Thus it is clear that the posture of this case differs from its posture when the court denied a similar motion to dismiss on state action grounds in 1985 in *Huron Valley Hospital v. City of Pontiac*, 612 F.Supp. 654. There, this Court was dealing only with plaintiff's allegations of actions involving both state and private actors, here the court has looked beyond plaintiff's mere allegations after extensive discovery to assess whether a reasonable jury could conclude a conspiracy existed between state and private actors to deprive plaintiff of its rights under the United States Constitution.

within its jurisdiction that was subject to CON or Section 1122 review. 42 U.S.C. §§ 300*l*-2(f), 1320a-1(b)(1). It is abundantly clear that NHPRDA envisions active cooperation and interaction among the regulators and the regulated towards a goal of efficient and economical provision of health care services. Such cooperation and interaction does not provide the state action necessary to support a lawsuit under Section 1983.

The Supreme Court allowed plaintiff to go to the jury in *Adickes*, *supra*, with relatively sketchy evidence of conspiracy between state and private actors. That case addressed racial discrimination in the South. However, this case addresses a business context and legislation which requires interaction between private parties and the state. The effect of this legislation upon the interaction between the private and the public parties must be considered in determining whether state action could be found here.[8] Therefore, plaintiffs cannot prove a conspiracy merely by showing that MDPH officials communicated with CHPC-SEM representatives Carroll and Massaron, and representatives of the four hospital defendants. The fact that MDPH assigned a new, and apparently inexperienced planning analyst to review plaintiff's application, has no bearing on the issue of conspiracy. Further, since MDPH was expected to solicit CHPC-SEM's recommendation, the Court cannot conclude that, merely because MDPH adopted verbatim parts of CHPC-SEM's recommendation, there existed an agreement between the state and private actors to deny plaintiff its CON without due process of law.

In the prior opinion rendered by this Court, the plaintiff conclusorary [sic] allegations of conspiracy between state officials and the private defendants were sufficient to defeat a motion to dismiss the Section 1983 count. With far-ranging discovery now complete, the Court finds that a jury could not reasonably find a

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[8] Admittedly, Michigan courts have held that the law was improperly administered by MDPH when it reviewed plaintiff's application, but the impropriety the state courts have pinpointed is the lack of duly promulgated rules establishing criteria in the CON process. There is a dearth of evidence that the source of any state policy dating back to 1974 was a conspiracy involving defendants and any state representative.

conspiracy between the private defendants and the state officials to deprive plaintiff of a property interest without due process of law.[9] The Court therefore finds that there is no state action as a matter of law, and defendants' motion for summary judgment on the Section 1983 count as to the hospital defendants, Massaron, and Carroll should be granted.

VI.

For the reasons given in this opinion, all motions for summary judgment are granted as to both the antitrust count and the 42 U.S.C. § 1983 count. Defendants may present orders and tax costs.

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[9] By this statement, the Court intends to make no comment on the merits of plaintiff's § 1983 claims against the state defendants who are still in this action but not now before the Court.

Relevant Statutes

15 U.S.C. §1

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

42 U.S.C. §300k

(a) The Congress makes the following findings:

* * *

(5) Since the health care provider is one of the most important participants in any health care delivery system, health policy must address the legitimate needs and concerns of the provider if it is to achieve meaningful results; and, thus, it is imperative that the provider be encouraged to play an active role in developing health policy at all levels.

* * *

(b) In recognition of the magnitude of the problems described in subsection (a) of this section and the urgency placed on their solution, it is the purpose of this Act to facilitate the development of recommendations for a national health planning policy, to augment areawide and State planning for health services, manpower, and facilities, and to authorize financial assistance for the development of resources to further that policy.

42 U.S.C. §300*l*-1(b)(3)(C)(i)

(C) The membership of the governing body and the executive committee (if any) of an [HSA] shall meet the following requirements:

(i) A majority (but not more than 60 per centum) of the members) shall be (I) residents of the health service are served by the entity who are consumers of health care and who are not providers of health care. . . .

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen

of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .